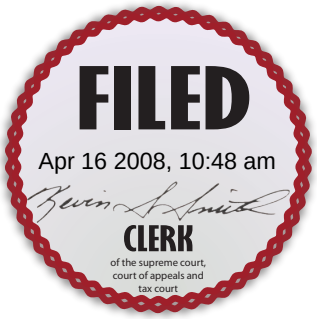

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IN THE
COURT OF APPEALS OF INDIANA

DION LANE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0705-CR-214
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Judge
Cause No. 71D08-0511-FB-150

April 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Dion Lane appeals his conviction, after a jury trial, of one count of robbery, as a class B felony, and his sentence.

We affirm.

ISSUES

1. Whether sufficient evidence supports the conviction.

2. Whether the trial court erred in sentencing Lane.

FACTS

At approximately 9:45 a.m. on October 25, 2005, teller Lyuba Dutkevich saw a man enter the branch of Key Bank wearing a sweatshirt with the hood pulled over his head. Because "it was warm outside," she was alarmed. (Tr. 5). He came to her station, put a note on the counter, and "pulled up his shirt." (Tr. 12). She "saw a gun," the butt of a gun that was tucked "in his pants." (Tr. 12, 27). The man said, "give me the money." (Tr. 12). Dutkevich "was too scared to even" read the note; she froze, staring at him; and the man again said to give him the money. (Tr. 6). The man leaned over the counter, grabbed money from her open drawer, and then turned and ran out of the branch. The money he took included a red dye pack amongst the bills.

The police were summoned and secured the note. Dutkevich told them the robber had "a black gun," (Tr. 48), and gave the officers a detailed description of the robber. The bank provided the officers with a number of still photographs that had been taken of the robber by the video camera at the branch.

Subsequent investigation led the officers to Lane. When initially questioned about the robbery, Lane denied any involvement – telling them that he was on a school field trip with one of his children that day. The officers went to the school and learned that there had been no field trip on October 25th (although Lane had accompanied children on a field trip on another date).

The officers talked to Lane's former girlfriend, Kimberly Smith, and she advised them that on October 25th, Lane had borrowed their son's minibike. Smith allowed police to search her home. In the basement, they found the minibike and a $10 bill, both bearing traces of a red substance. When the officers showed Smith the robbery photographs, she said the man appeared to be Lane and was wearing what she believed to be his clothing.

The officers questioned Lane again, informing him of the evidence against him. Lane confessed to having robbed the bank, but he denied having a gun. Lane told the officers that he had been on crack cocaine at the time and did not remember everything; asked about the note, he said he did not remember there being a note.

On November 14, 2005, the State charged Lane with robbery with a firearm, a class B felony. Lane was tried by a jury on March 19-20, 2007. As recounted above, Dutkevich testified that Lane pulled up his shirt to display the gun tucked in his pants. During cross examination, she conceded that she "just saw the handle," which she described as "squared off" and "black." (Tr. 29, 28). When asked whether it was possible that she "just assumed he had a gun," Dutkevich responded, "No. . . . There's no

doubt in my mind." (Tr. 32). The note was admitted into evidence; it said "I have a gun give me money." (Ex. 7).

During closing arguments, the parties agreed that the single disputed fact was whether there was a gun. According to the transcript, the jury was given three verdict forms: guilty of robbery as a class B felony, guilty of robbery as a class C felony, and not guilty. The jury's verdict found Lane guilty of robbery as a class B felony.

On April 18, 2007, the trial court conducted the sentencing hearing. It ordered Lane to serve a twenty-year term.[1]

DECISION

1. Sufficiency of the Evidence

> When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder *could* find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted, emphasis in original).

[1] On August 23, 2007, Lane filed his appellant's brief in the Clerk's Office. On September 25, 2007, the State filed the appellee's brief. Unfortunately, this case was not then transmitted to this court from the Clerk's Office until March 7, 2008.

Lane argues that the State failed to prove that he was armed with a firearm when he committed the robbery. Specifically, he asserts that the "only evidence that a gun was used was the testimony of the bank teller, who testified that he unzipped his sweatshirt to show her the gun," but the still photographs taken during the robbery show neither a gun nor "any action on the part of Lane which could be construed as opening his sweatshirt." Lane's Br. at 3. Lane essentially asks that we reweigh the evidence and assess witness credibility.

As quoted above, Dutkevich testified that Lane "pulled up" his sweatshirt to reveal the gun tucked in his pants. (Tr. 12). She was unequivocal that she saw a gun, and expressly testified that she had "no doubt" that she saw a gun. (Tr. 32).

Lane challenges whether the photographs support Dutkevich's testimony that he was armed with a gun at the time of the robbery. The still photographs taken by the bank camera reflect that they were taken at intervals of slightly less than five seconds. The photographs were taken from a camera aimed down and to one side, and in the two shots of the robber before he leans over to grab the money (at which time only his back is visible), most of his torso from the waist to his armpit is not visible.

However, contrary to Lane's challenge, Dutkevich's testimony was not the only evidence of his being armed. Lane admitted that he was the man who robbed the bank, and the note that the robber placed on the counter read, "I have a gun give me money." (Ex. 7).

We find that sufficient probative evidence and the reasonable inferences therefrom support the jury's conclusion that the State had proven beyond a reasonable doubt that Lane had a firearm when he committed the robbery. *Drane*, 867 N.E.2d at 146-47.

2. Sentence

Lane also argues that the trial court "abused its discretion by improperly weighing the aggravating and mitigating factors and imposing the maximum sentence."[2] Lane's Br. at 10. We cannot agree.

The trial court's written order and comments at sentencing indicate that it found Lane's three prior felony convictions, previous probation failures, and pending criminal charges to be aggravating circumstances, and it found no mitigating circumstances. Inasmuch as Lane has not provided a copy of the pre-sentence investigation report as part of his Appendix, we have no details as to his criminal history. However, Lane's brief acknowledges his "convictions for residential entry, dealing in cocaine, and auto theft."[3] *Id.* at 9. He also acknowledges that at the time of sentencing, he had a pending burglary charge. Nevertheless, he argues the trial court improperly weighed "aggravating and mitigating factors." *Id.* at 10.

In *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), Indiana's Supreme Court affirmed that sentencing rests within the sound discretion of the trial court. It noted that

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[2] *See* Ind. Code § 35-50-2-5.

[3] In the appeal of his April 19, 2007, sentencing on another conviction, another panel of this court noted at that sentencing (a day after the sentencing herein), it was found that Lane "was out on bond for felony charges . . . when he committed the bank robbery . . . and had three prior felony convictions for dealing in cocaine." *Lane v. State*, No. 71A04-0705-CR-278 at *4 (Ind. Ct. App. Dec. 19, 2007).

one way that discretion might be abused was if a mitigating factor was not found when "clearly supported by the record and advanced for consideration." *Id.* at 491. However, Lane did not argue the existence of any mitigating factor to the trial court, and none is shown in the record before us. It would be an abuse of discretion to find a factor aggravating when "the record does not support" that, or the aggravating factor is "improper as a matter of law." *Id.* at 490, 491. However, Lane appears to concede that the record supports the trial court's finding as to his criminal history, and a defendant's criminal history is a proper aggravating factor. *See Golden v. State*, 862 N.E.2d 1212, 1216 (Ind. Ct. App. 2007), *trans. denied*. Finally, appellate courts do not engage in a review of whether the trial court "properly weighed" aggravating and mitigating factors when imposing sentence. *Anglemyer*, 868 N.E.2d at 491. We find no abuse of discretion in the sentence imposed.

Lane also asserts that his "sentence was inappropriate in light of the facts and circumstances surrounding this case." Lane's Br. at 7. We have the authority to revise a sentence if, "after due consideration of the trial court's decision," it is found that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate rule 7(B). The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

As already noted, we do not have the pre-sentence investigation report. Further, Lane presented no evidence at sentencing as to his character. The record before us

reflects that despite multiple felony convictions and failed attempts at probation, Lane is unable to conform his conduct to the laws of society.

Lane has failed to persuade us that his sentence is inappropriate, *see Childress*, 848 N.E.2d at 1080, and we find that the twenty-year sentence imposed is appropriate to his character and the nature of the offense.

Affirmed.

SHARPNACK, J., and NAJAM, J., concur.